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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 404.

THE UNITED STATES, *Appellant,*

vs.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

THE OPINION OF THE COURT OF CLAIMS.

With the findings of fact the Court of Claims filed simply a memorandum as follows:

> "See Reading Company, No. 34747, 60 C. Cls.—; Southern Railway Co., No. B-118, 60 C. Cls.—; and New York, New Haven & Hartford R. R. Co., No. B-44, 60 C. Cls.—." (R. 15)

GROUNDS OF JURISDICTION.

The final judgment in the present case was entered on January 5, 1925. The appeal was allowed April 13, 1925.

The appeal was taken under sections 242 and 243 of the Judicial Code. (R. 27-28)

STATEMENT OF THE CASE.

After the submission of this case in the Court of Claims an order was made referring it and certain other cases (all of which are now before this court, consolidated and set down for argument together) to a special commissioner to ascertain and report the facts. Thereafter, the special commissioner filed his reports and proposed findings of fact in all the cases mentioned. They were re-submitted October 29, 1924. On January 5, 1925, the court announced its decision approving and adopting the findings of fact reported by the special commissioner, and entered judgment in each case for the plaintiff. (R. 7, 8, 14)

From the findings of fact we take the following statement of the case. (R. 8-14)

In 1916 and 1917 the railway company, in cooperation with other carriers, carried on Government bills of lading, as freight, numerous shipments of camp equipment and military impedimenta, the property of the United States, including wagons, guns, limbers, horses, kitchen outfits, ammunition, forage, and miscellaneous property of similar character.

For the said transportation the railway company, as the final and delivering carrier, presented its bills based on the lawfully published tariff rates less land-grant deductions. The disbursing officer made certain payments, including, on account of the bills involved in this case, the sum of $15,143.91.

Later, the Auditor for the War Department, in auditing the disbursing officer's accounts, disallowed the said payment of $15,143.91, because of a ruling of the Comptroller of the Treasury that the Government was entitled to the carriage of one carload of military impedimenta free with every twenty-five soldiers carried as passengers, under certain provisions of the passenger tariffs.

In the meantime, the railroads were taken over by the Government, on January 1, 1918, and remained under Federal control until March 1, 1920.

Inasmuch as there were no current accounts between the railway *company* and the Government at the time when the Auditor for the War Department made his disallowance, it was necessary to find some way to get the money back into the Treasury if the disallowance was to be made effective. The Auditor for the War Department adopted the method of deducting the amount in question *from money due the United States Railroad Administration* on account of transportation service during Federal control. (R. 11.) It was obviously a recovery from the Railroad Administration of the overpayment claimed to have been made to the railway company, leaving to the Railroad Administration the task of getting the money from the railway company.

The amount so deducted from the Federal bills was carried in an account entitled "Corporate Transactions" in accordance with the provisions of General Order No. 17. (R. 11, 15-16.) After the termination of Federal control, in accordance with General Order No. 66, the amount so deducted, $15,143.91, was charged against the railway company by the Railroad Administration, and by the railway company was credited to the Railroad Administration and charged against the War Department to await action by the Auditor or the Court of Claims. (R. 11, 18-25)

July 29, 1921, the railway company and the Director General of Railroads entered into a final settlement contract, the material parts of which are copied in the findings of fact. (R. 14.)

ARGUMENT.

It was conceded in the Court of Claims that the disallowance by the Auditor for the War Department was wrong. *Missouri Pacific Railroad Co. vs. United States,* 56 Ct. Cls. 341. See also the opinion of this Court in *St. L. B. & M. Ry. Co. vs. United States,* 268 U. S. 169, 173.

The sole question for decision is the right of the railway company, *having suffered the loss as a result of the disallowance by the Auditor and the recovery of the money into the Treasury through the instrumentality of the Railroad Administration,* to recover by suit in the Court of Claims.

1. THE RAILWAY COMPANY'S CAUSE OF ACTION.

Admittedly the railway company performed service for the War Department for which it has been paid $15,143.91, *less than it should have been paid.* The payment which was made at once by the Army disbursing officer was subsequently disallowed and recovered into the Treasury, and the railway company was left with nothing but a "claim" which now the Government seeks to defeat. The findings show that that result was reached through the acts of two departments of the Government. First, the Auditor for the War Department disallowed the original payment (wrongly, as is now admitted). Second, the Railroad Administration, another department of the government, allowed the Auditor for the War Department to use it (the Railroad Administration) as an instrument by which the amount in question could be recovered from the railway company. The findings show that the amount in question was so taken from the railway company, not through any act of its own, but through the act of the Auditor for the War Department, aided by the intervention of the Railroad Administration.

It is inconceivable that under such circumstances the railway company cannot recover from the United States the compensation lawfully due it for the service rendered. It may recover on the theory that the recovery by the Government of the money originally paid, by means of the disallowance and deduction made by the Auditor for the War Department and the charging back made by the Railroad Administration, was improper and erroneous (which is ad-

mitted), and there is necessarily an implied contract to repay to the railway company the amount so recovered and withheld from it.

Or the suit may be regarded as a cause of action on the transportation service performed by the railway company for which payment was originally made in full, but later withdrawn in the manner described. Admittedly, the Government has not paid for the service and the railway company has suffered the loss. Certainly it may be said, therefore, that the money is still due the railway company for the transportation service rendered.

Or, third, the suit may be regarded as an equitable claim, in the nature of an equitable assignment. Of equitable claims "for damages" or for money judgments, the court has jurisdiction under section 145 of the Judicial Code.

"Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

> "First, All claims * * * or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable. * * * "

2. THE SETTLEMENT OF JULY 29, 1921, AS A DEFENSE.

The suit is defended on the ground that the settlement of July 29, 1921, between the railway company and the Director General of Railroads, is a bar to the railway company's right to recover, that is, that it has released the United States from liability.

In the agreement of July 29, 1921, the railway company acknowledges the payment of money by the Director General in full satisfaction of all claims, etc., "against the Director General, or anyone representing or claiming to represent the Director General, the United States, or the President, growing out of or connected with the possession,

use and operation of the Companies' property by the United States during the period of Federal control, * * *." (R. 14)

The claim of the railway company *in this case* is not a claim against the Director General. The findings show that it never has been a claim against the Director General, but is and has always been a claim *against the War Department on account of transportation service performed prior to Federal control.* The Director General was concerned only to the extent that the deduction was erroneously made by the Auditor from money credited to him (the Director General) and that he (the Director General) charged it against the railway company and was given credit therefor and was later fully reimbursed.

The settlement of July 29, 1921, was based upon a statement of account between the Director General and the railway company, which is quoted in Finding IX. (R. 13.) That statement of account shows that there was no dispute between the parties as to the amount due on the account Corporate Transactions, which included the sum of $15,143.91 representing the deductions made by the Auditor for the War Department. Both the Director General and the company agreed that the sum of $1,024,167.83, shown in the account Corporate Transactions as due from the company to the Director General, was correct, and in the final settlement that account was paid in full by the company to the Director General. It is clear, therefore, that the sum of $15,143.91, which was included in the total balance of $1,024,167.93 in the account Corporate Transactions, was actually reimbursed and paid to the Director General, and that the loss of $15,143.91 from revenue earned by the company in 1916 and 1917 and carried on its books as a charge against the War Department, *is an actual loss.*

The claim here in suit has never been a claim against the Director General, but always a claim against the War Department and has been so charged on the railway company's

books, both *before* and *after* the final settlement with the Director General.

It is not a claim growing out of the possession, use and operation of the railway company's property during Federal control, for the same reasons. It is a claim for an unpaid balance due for transportation furnished in 1916 and 1917, prior to Federal control. The manner in which the disallowances made by the Auditor were made effective and were finally charged against the railway company cannot change the essential fact that the claim in this case is for *an unpaid balance due for transportation furnished in 1916 and 1917.*

Respectfully submitted,

ALEX. BRITTON,
LAWRENCE H. CAKE,
Counsel for Appellee.

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BALTIMORE AND OHIO RAILROAD COMPANY
TROOP AND IMPEDIMENTA CASES
PRIOR TO FEDERAL CONTROL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 499

THE UNITED STATES

vs.

BALTIMORE AND OHIO RAILROAD COMPANY.

No. 500

THE UNITED STATES

vs.

BALTIMORE AND OHIO RAILROAD COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 499

THE UNITED STATES, Appellant,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

Statement.

This case is here on appeal by the United States from the Court of Claims.

The Court of Claims, on February 16, 1925, entered its judgment in favor of appellee in the amount of $16,588.13, mentioned in its finding ten (Rec. p. 13), and the sum of $2,208.55, mentioned in its finding twelve (Rec. p. 14), a

total of $18,796.68. The appellant concedes that the sum of $2,208.55 is proper and does not resist said item (Appellant's Brief p. 95). The questions, therefore, for determination by the court in this case are whether any errors of law have been made by the Court of Claims in granting judgment to appellee in the amount of $16,588.13, mentioned in the lower court's finding ten, and also in its application of the law to finding nine.

It will be noted that the Court of Claims found in part in finding eight the following:

> "At different times during the years 1916 and 1917, beginning in June, 1916, and ending in December, 1917, the plaintiff and its connecting carriers transported over its respective lines, upon Government transportation requests, numerous movements of United States troops. For this service the plaintiff, as initial carrier, presented its bills, based on net per capita fares obtained by combinations only on the western gateways specified in the interterritorial arrangements of 1916 and 1917, to the proper disbursing officer."
>
> (Rec. p. 12.)

The Court of Claims found in part in finding ten that:

> "The Auditor for the War Department in auditing the accounts of said disbursing officer disallowed as overpayments by him of plaintiff's said bills amounts aggregating $20,978.45, and these amounts were deducted at different times from March 12, 1920, to September 17, 1920, inclusive, from bills of the Railroad Administration by the Auditor. Of the said deductions amounts aggregating $16,588.13 were obtained by routing so as to make combinations on

points not authorized by the interterritorial military arrangements of 1916 and 1917."

(Rec. p. 13.)

Finding nine made by the Court of Claims is very pertinent to this statement and is as follows:

"The bill No. 32293 T/R 20383 was rendered for $3,721.39, and upon refusal of the disbursing officer to pay it was restated at $3,705.94, a difference of $15.45, in which amount it was paid and received by plaintiff without protest on June 12, 1917. Bill No. 33076 T/R 61787 was rendered for $7,782.97, based on a net per capita fare of $26.03, and upon refusal of the disbursing officer to pay it was restated at $7,343.44 by plaintiff, based on a net per capita fare of $24.56, in which amount it was paid on March 25, 1918, to the Director General of Railroads and received without protest. The plaintiff presented a supplemental bill No. 33076-A to the Auditor for the War Department for the difference between the net fares of $25.87, $7,735.13, and the net fares of $24.56, $7,343.44, a difference of $391.69, which was disallowed by the auditor on July 24, 1918, without protest by plaintiff. Bill No. 34295 T/R 354992, was rendered for $4,655.56, based on a net per capita fare of $25.58, and upon refusal by the disbursing officer to pay it plaintiff restated it at $4,469.92 based on a net *per capita* fare of $24.56, in which amount it was paid to the Director General of Railroads on April 1, 1918, and received by him without protest. The plaintiff filed a supplemental bill for the amount dropped in the restatement, $185.64, with the auditor, who disallowed same on October 9, 1918, without protest from plaintiff.

"Bill No. 34078 (T/Rs 34460, 344543, 344347, and 344541) was rendered by plaintiff for $14,919.98 and was paid by the disbursing officer to the Director General of Railroads in full as presented on April 16, 1918. On March 25, 1919, plaintiff presented a supplemental bill, No. 34078-A, to the auditor for $16,759.80, a difference of $1,839.82, which was disallowed by him without protest from plaintiff on April 23, 1919."

(Rec. pp. 12-13.)

In finding thirteen, the Court of Claims found:

"Of the amount deducted by the auditor from Railroad Administration bills at different times from March 12, 1920, to September 17, 1920, $20,978.45, the sum of $13.58 was refunded by plaintiff to the War Department on July 7, 1919, and the sum of $20,939.52 was charged back to plaintiff by the Railroad Administration in December, 1921, through the account 'Federal assets collected' and $25.35 was charged back to plaintiff by the Railroad Administration through the account 'Corporate transactions.'"

(Rec. p. 14.)

The Court of Claims in finding fourteen also found in part:

"In December, 1921, the plaintiff paid the amount charged back to plaintiff through the account 'Federal assets collected' $20,939.52 into the 'trustee fund' to credit of the Railroad Administration, and charged the same on its books in a suspense account against the War Department."

"The trustee account was created by General Order No. 68, issued February 24, 1920, to take effect at the

termination of Federal control, at 12 o'clock midnight, February 29, 1920. By this order the different railroads that had been under Federal control were made trustees of the United States Railroad Administration to collect all of its unpaid bills and to pay all of its outstanding liabilities and generally to wind up all of its unfinished transportation business. All Federal cash pertaining to the transportation business was turned over to the railroads to be carried in this account. Any moneys erroneously paid into the trustee account by deposit in the banks where such accounts were kept could be withdrawn by a railroad company making such deposits with the consent of the Director General of Railroads."

(Rec. p. 14.)

The Court of Claims found in part in finding fifteen:

"The sum of $25.35 deducted from a Railroad Administration bill on August 14, 1918, on account of alleged overpayment by the disbursing officer of corporate bill before Federal control and charged back to the plaintiff in December, 1921, through the account 'Corporate transactions' by the Railroad Administration was paid to said Railroad Administration by plaintiff in the final settlement of July 27, 1922, through said account 'Corporate transactions.' "

"The act of February 28, 1920 (41 Stat. 456, 457), provided for the termination of Federal control on February 24, 1920, General Order No. 66, effective February 29, 1920, was issued by the United States Railroad Administration for the purpose of outlining the method to be followed in the separation of the accounts of the Railroad Administration and the different railroads under its control when the railroads

should be returned to their owners, which provided among other things that:

"'Sec. 5. (*a*) * * * If during the period of Federal operations amounts representing overcharge freight claims paid out of Federal funds, affecting traffic, the revenues from which were included in corporation revenue or credited to it as lay-over revenue on the Federal books, or amounts representing loss and damage claims paid out of Federal funds, chargeable to the period prior to Federal control, were carried on the Federal books in suspense accounts pending adjustment thereof with other carrier corporations, or pending receipt of additional information wherewith to dispose of the amounts carried, and such amounts are carried in suspense account as of February 29, 1920, they shall be charged to the corporation. Such amounts shall on the Federal books be charged to the account '(Name of corporation)—Corporate transactions,' and on the corporate books should be charged to an appropriate suspense account and credited to the account 'U. S. Government—Corporate transactions.'"

(Rec. p. 15.)

In finding seventeen the Court of Claims found in part that "On August 26, 1920, the Comptroller of the Railroad Administration issued, with the approval of the Director General of Railroads, accounting circular 152," and the pertinent part of said circular for the purposes of this statement is:

"Unpaid bills carried in the Federal accounts against the War Department, for transportation service performed prior to Federal control, shall not be closed into the account 'War Department transporta-

> tion charges,' but instead shall be charged to the corporation through the account '(Name of corporation)—Corporate transactions.' Such charges against the corporation, when reported on settlement statement Form AC-510, shall be allocated to the quarter in which the corporation was originally credited with the amount, or bill was stated in the accounts."
>
> (Rec. pp. 16-17.)

In the final settlement agreement of July 27, 1922, between the director general and the Baltimore and Ohio Railroad Company, the Court of Claims set forth the material parts of said final settlement agreement, a portion of same being as follows:

> "The purpose and effect of this instrument is to evidence a complete and final settlement of all demands, of every kind and character, as between the parties hereto, growing out of the Federal control of railroads, *save and except that the following matters are not included in this adjustment and are not affected thereby:*
>
> *'Exceptions.*
>
> * * * * * * *
>
> " '2. This settlement does not include or affect any moneys or assets of the director general turned over to the companies, or any of them, pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.' " (Italics ours.)
>
> (Rec. pp. 15-16.)

The Memorandum of the Court of Claims holds in part:

> "1. The several items claimed, as set forth in Finding IX, are not recoverable where the bills were rendered to disbursing officers and payments by him were received. (See Oregon-Washington R. & N. Co., 255 U. S. 339; 54 C. Cls. 131; Baltimore & Ohio Railroad Company case, 52 C. Cls. 468.)
>
> "3. The auditor's deductions, aggregating $16,588.13 (Finding X), obtained by routing or making combinations on points not authorized by the interterritorial military arrangements were erroneous. (See Atchison, Topeka & Santa Fe Railroad Company case, 256 U. S. 205.)"
>
> (Rec. pp. 17-18.)

ARGUMENT.

Questions for Determination.

The questions for determination by the court are as to whether any errors of law have been made by the Court of Claims in its application of the law to its findings of fact made in this case. This argument shall therefore be addressed to a review of the record and as to whether any errors of law have been made by the court below.

Findings of Fact in Nature of Special Verdict.

This court has repeatedly held that the findings of fact made by the Court of Claims are to be treated like the verdict of a jury. Mr. Justice Pitney, in the case of Brothers *vs.* United States, in 250 U. S. 88, said:

> "For the purposes of our review the findings of that court are to be treated like the verdict of a jury,

> and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope. United States *v.* Smith, 94 U. S. 214, 218, 24 L. ed. 115; Stone *v.* United States, 164 U. S. 380, 382, 41 L. ed. 477, 478, 17 Sup. Ct. Rep. 71; District of Columbia *v.* Barnes, 197 U. S. 146, 150, 49 L. ed. 699, 700, 25 Sup. Ct. Rep. 401; Crocker *v.* United States, 240 U. S. 74, 78, 60 L. ed. 533, 536, 36 Sup. Ct. Rep. 245, and cases cited."

It will, therefore, be seen that the findings of fact made by the Court of Claims are binding upon the parties. No question has been raised by appellant to any of the findings.

No Assignment of Errors made by Appellant in this Case.

The appellant has contented itself with making certain alleged assignment of errors in the Reading case (Appellant's Brief, p. 9), but no assignment of errors are made by it in this case. At page 101 of its brief, it makes this statement: "This case is companion to the foregoing cases. The judgment should be reversed to the extent of $16,588.13." For what reason or reasons should the judgment in this case be reversed "to the extent of $16,588.13"? We contend that appellant has utterly failed to make a showing in that regard. As stated heretofore, the parties are bound by the findings of the Court of Claims; therefore we are unable to see wherein the appellant has pointed out any errors of law patent on the face of the record as affecting the amount of $16,588.13.

This Case Not Affected by Final Settlement Agreement of July 27, 1922.

The Final Settlement Agreement of July 27, 1922, made between the Director General and the Baltimore and Ohio Railroad Company, very clearly states under "Exceptions":

> "'2. This settlement does not include or affect any moneys or assets of the director general turned over to the companies, or any of them, pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.'"
>
> (Rec. p. 16.)

It will be seen from the foregoing that the trustee account is specifically exempted from the Final Settlement Agreement of July 27, 1922. The Court of Claims states in its finding fifteen how the trustee account of the Director General was created, for it found:

> "The trustee account was created by General Order No. 68, issued February 24, 1920, to take effect at the termination of Federal control, at 12 o'clock midnight, February 29, 1920. By this order the different railroads that had been under Federal control were made trustees of the United States Railroad Administration to collect all of its unpaid bills and to pay all of its outstanding liabilities and generally to wind up all of its unfinished transportation business. All Federal cash pertaining to the transportation business was turned over to the railroads to be carried in this account. Any moneys erroneously paid into the trustee account by deposit in the banks where such accounts

were kept could be withdrawn by a railroad company making such deposits with the consent of the Director General of Railroads."

(Rec. p. 14.)

The Baltimore and Ohio Railroad Company corporation was charged with the sum of $20,939.52 by the Railroad Administration through the account "Federal assets collected" in December 1921 (Rec. p. 14, finding 13), and in December, 1921, the Baltimore and Ohio paid the amount charged back to it through the account "Federal assets collected" $20,939.52 into the "trustee fund" "to credit of the Railroad Administration and charged the same on its books in a suspense account against the War Department" (Rec. p. 14, finding 14). In December, 1921, the sum of $25.35 was charged back to plaintiff by the Railroad Administration through the account "Corporate transactions" and the said amount of $25.35 deducted from a Railroad Administration bill on August 14, 1918, on account of alleged overpayment by disbursing officer of corporate bill before Federal control was paid to the Railroad Administration in final settlement of July 27, 1922, through said account "Corporate transactions" (Rec. pp. 14-15). The Court of Claims held that the "several items claimed, as set forth in Finding IX, are not recoverable where the bills were rendered to disbursing officers and payments by him were received" on the authority of "Oregon-Washington R. & N. Co., 255 U. S. 339; 54 C. Cls. 131; Baltimore & Ohio Railroad Company, 52 C. Cls. 468" (Rec. pp. 17-18), and allowed $16,588.13 in its finding 10 on the ground that:

> "3. The auditor's deductions, aggregating $16,588.13 (Finding X), obtained by routing or making combinations on points not authorized by the interterritorial military arrangements were erroneous. (See Atchison, Topeka & Sante Fe Railroad Company case, 256 U. S. 205.)"

The findings of the Court of Claims conclusively show that the transaction herein between the Railroad Administration and the Baltimore and Ohio Railroad Company of the charge back of the $20,939.52 to the corporation by the Railroad Administration and the payment of the said amount of $20,939.52 by the Baltimore and Ohio Railroad Company to the Railroad Administration was clearly outside the Final Settlement Agreement of July 27, 1922, for the instrument specifically states:

> "save and except that the following matters are not included in this adjustment and are not affected thereby,"

and then, under the "Exceptions," the trustee account of the Director General, under General Order No. 68, is excepted from the final settlement.

(Rec. p. 16, finding 16.)

The court will further note that the amount of $20,939.52 was paid by the Baltimore and Ohio Railroad Company into the "trustee fund" of the Director General in December, 1921 (Rec. p. 14), whereas the Final Settlement Agreement between the Baltimore and Ohio Railroad Company and the Director General was of July 27, 1922 (Rec. p. 15), which further shows it was outside the provisions of the final

settlement providing "full satisfaction and discharge of all claims, rights and demands of every kind and character."

An Error of Law as to Finding Nine.

We hold that the Court of Claims erred in denying recovery of the total amount of $2,432.60 in its finding nine. There is no disagreement by appellee with the facts in said finding. It would appear, however, that appellee is also entitled to the amount of $2,432.60, and that the case of Oregon-Washington R. & N. Co., 255 U. S. 339, is not applicable to the facts in said finding. The Court of Claims found that no protest had been filed at the time of payment of the several bills therein and cited the decision of this court in the Oregon-Washington R. & N. Co. case, *supra,* as a bar to recovery.

In finding nine, it is shown that because of the refusal of the disbursing officers to pay said bills as first rendered appellee restated them in different amounts, and no protest was made by appellee at the time of payment. Certain supplemental bills were presented by appellee to the auditor but were disallowed by him without protest from appellee. Appellee in the lower court insisted on payments of these aggregate amounts, totaling $2,432.60, and no question is raised against them except that of protest. We think that finding nine presents the exact question as to protest as determined by this court in St. Louis, Brownsville & Mexico Railway Company, appt., *vs.* United States, decided April 27, 1925, wherein the court said:

> "The Government did not establish the affirmative defense of acquiescence by showing merely acceptance without protest. To hold that such acceptance

> barred the right to recover the balance wrongly withheld was to give it an effect in judicial proceedings similar to that which it had within the executive department under the Dockery Act. See Lancaster *v.* United States, 57 Ct. Cl. 284. For such a rule there is no support either in the legislation of Congress or in the decisions of this court. Compare Clyde *v.* United States, 13 Wall. 38, 20 L. ed. 479. The railway was entitled to judgment for the amount wrongly deducted by the Auditor."

The appellant, in its brief (Rec. p. 94), states:

> "The Court of Claims held that deductions made by the Auditor to the extent of $4,390.32 were proper and no cross-appeal was taken by Baltimore & Ohio. No question arises as to them."

It is true that the appellee took no cross-appeal in this case, but the appeal of the Government brought the entire record before this court for review. That review, as this court has stated, is confined to a review of the findings of the lower court as to whether any errors of law have been made by the lower court. It was stated in United States *vs.* Smith, in 94 U. S. 214, referring to findings of the Court of Claims:

> "This finding is conclusive, unless impeached for some error in law appearing in the record."

Appellee contends that, as the record of the case is in this court, it may call to the court's attention any errors of law patent on the record. That is all it is seeking to do when it states that under the decision of this court in St. Louis, Brownsville & Mexico Railway Company, *supra,* an error of

law is apparent as to finding nine of the Court of Claims, and therefore it should have judgment for the additional amount of $2,432.60 by reason of the facts set forth in finding nine.

Erroneous and Illegal Action of the Auditor for the War Department.

The Court of Claims has found that the appellee is entitled to recover $16,588.13 (Finding X, Rec. p. 13), and that:

> "3. The Auditor's deductions, aggregating $16,588.13 (Finding X), obtained by routing or making combinations on points not authorized by the interterritorial military arrangements were erroneous. (See Atchison, Topeka & Santa Fe Railroad Company case, 256 U. S. 205.)"
>
> (Rec. p. 18.)

In other words, the Auditor for the War Department had no legal authority to make a deduction from the Director General's bills, but, having done so, the Director General charged the same to the Baltimore & Ohio Railroad Company through the account "Federal Assets Collected" because he did not concede that the deduction should be made from his bills, as the amount involved arose under corporate control and prior to Federal control, and therefore the amount taken by the Auditor for the War Department was the same as though it had been directly taken from the appellee as the appellee paid the amount to the Railroad Administration that had been charged back to it. The Director General happened to be the medium through which the charge-back

deduction was made, and he is only incidental to the main issue involved in this suit.

What was said in part by the Court of Claims in Southern Railway Company *vs.* the United States, No. B-118, C. Cl., decided January 5, 1925, page 13, applies to the facts of the instant case:

> "Plaintiff's services in transporting troops and property of the United States prior to the taking possession and control of railroads by the Government did not grow out of and was not an incident to Federal control, nor were the deductions that were made from these bills as rendered incidents to or matters growing out of Federal control."

The findings show that appellee has been given judgment for an amount of money for services rendered by it to the War Department prior to Federal control. It was held in Dupont *vs.* Davis, 264 U. S. 460-462, that:

> "Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States."

From the foregoing, it is clearly seen that this court gave emphasis only to "Moneys and other property derived from the operation of carriers during Federal control," which carries with it the exclusion of moneys and other property derived from operation of the carriers prior to Federal control.

No Case in Point.

We have been unable to find in appellant's brief any case in point with the instant case, that prohibits a recovery by appellee on the findings made by the Court of Claims in this case.

Conclusion.

The judgment of the Court of Claims should be affirmed as to the amount of $18,796.68 and the additional amount of $2,432.60, which, under the decision of this court in St. Louis, Brownsville & Mexico Railway Company, *supra,* is due under finding nine and should be allowed appellee, and the judgment of the Court of Claims as to finding nine should be reversed.

Very respectfully,

GEORGE E. HAMILTON,
JOHN F. McCARRON,
Attorneys for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 500

THE UNITED STATES, Appellant,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

Statement.

This case, like No. 499, is here on appeal by the United States from the Court of Claims.

The Court of Claims, on February 16, 1925, entered its judgment in favor of appellee in the amount of $6,315.45, mentioned in its finding ten (Rec. pp. 9-10-11), and the sum of $735.68, mentioned in its finding nine (Rec. pp. 9-11), a total of $7,051.13. The appellant concedes that the sum of $735.68 is proper and does not resist said item (Appellant's Brief, p. 101). The sole question, therefore, for determination by the court in this case is whether an error

of law has been made by the Court of Claims in granting judgment to appellee in the amount of $6,315.45, mentioned in the lower court's finding ten.

The Court of Claims found in part in finding ten that:

> "At various times during the years 1916 and 1917 the plaintiff and its connecting carriers transported United States troops with accompanying military impedimenta to terminal points on plaintiff's lines. The troops were moved on Government transportation requests and the military impendimenta on Government bills of lading as freight. For such services the plaintiff presented its corporate bills Nos. 34216D, 34854, 32815, 33808, 33206, 3485-A, 34871, 34009, and 34872, amounting to $8,074.63, to the proper disbursing quartermaster for payment. These bills were paid by the disbursing officer as presented. Nos. 33206, for $273.88, was paid on November 1, 1917, and 34216, for $463.20, was paid on December 26, 1917 (a total of $737.08), to the plaintiff; the remaining bills, amounting to $7,337.55, were paid by said disbursing officer from January 7, 1918, to July 16, 1918, inclusive, to the United States Railroad Administration and credited by the Director General to the plaintiff through the account 'B. & O. R. R. Co.—Assets 12/31/17 collected,' as provided by General Order No. 17. The accounting officers in auditing the accounts of the said disbursing officer disallowed $6,315.45 as overpayment by him on said corporate bills, and from Railroad Administration bills Nos. 812-1901, 96-1274, 88-1147, 98-1175, 94-1487, 98-1094, 98-1154, 97-1142, 88-1392, deducted from March 12, 1920, to July 16, 1920, said $6,315.45. Of this amount the whole payment to plaintiff on the corporate bills, $737.08, were deducted as overpayments and the balance, $5,578.37, was deducted on account of alleged overpayments to the Railroad

Administration on corporate bills. The amount so deducted from Railroad Administration bills, $6,315.45, was charged on its books in an appropriate account against the plaintiff, which in turn credited said amount on its books to the Railroad Administration and charged the same in a suspense account against the War Department to await action by the auditor or the Court of Claims. During December, 1921, the plaintiff paid the amount so deducted, $6,315.45, into its trustee account to the credit of the Director General of Railroads.

(Rec. pp. 9-10.)

The court also found in finding eleven in part that:

"The trustee account was created by General Order No. 68, issued February 24, 1920, to take effect at the termination of Federal control, at 12 o'clock midnight, February 29, 1920. By this order the different railroads that had been under Federal control were made trustees of the United States Railroad Administration to collect all of its unpaid bills and to pay all of its outstanding liabilities, and generally to wind up all of its unfinished transportation business. All Federal cash pertaining to the transportation business was turned over to the railroads to be carried in this account. Any moneys erroneously paid into the trustee account by deposit in a bank where such account was kept could be withdrawn by a railroad company making such deposit, with the consent of the Director General of Railroads."

(Rec. p. 10.)

In finding twelve the Court of Claims found in part:

"There was a final settlement agreement entered into between the plaintiff and the Director General of Railroads, dated July 27, 1922, by the second excep-

tion to which the items contained in the trustee account were excepted as follows: 'This settlement does not include or affect any moneys or assets of the Director General turned over to the company pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.' "

(Rec. p. 10.)

ARGUMENT.

The Sole Question.

There is only one question for determination by the court in this case, and that is, "Has the Court of Claims erred in its application of the law to its findings of fact made in this case?" We contend that the lower court has not erred.

We respectfully submit that our argument in No. 499 applies with equal force here, in that finding ten shows that the services rendered by appellee for transporting troops and property was prior to Federal control of the railroads and "did not grow out of and was not an incident to Federal control, nor were the deductions that were made from these bills as rendered incidents to or matters growing out of Federal control."

Conclusion.

The judgment of the Court of Claims should be affirmed.

Very respectfully,

GEORGE E. HAMILTON,
JOHN F. McCARRON,
Attorneys for Appellee.